IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

JAMES O. GREENAN AND EDITH GREENAN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

There was no opinion by the Tax Court of the United States. The order of the Tax Court dismissing the petition as to Edith Greenan appears in the record, page 49. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the order and judgment of the Tax Court (R. 65) is reported at 145 Fed. (2d), p. 134.

II

Jurisdiction

The date of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit now sought to be reviewed is October 16, 1944.

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

III

Statement of the Case

The statement of the case in the foregoing and attached petition is hereby referred to, and as it embodies all essential facts and proceedings in the interest of brevity will not be repeated.

IV

Specifications of Error

1. That the United States Circuit Court of Appeals for the Ninth Circuit erred in entering its judgment affirming the decision of the Tax Court of the United States in said cause wherein the petition for redetermination of the tax liability of the petitioners James O. Greenan and Edith Greenan in said Tax Court was dismissed as to Edith Greenan (R. 68).

2. That the United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that verification of the petition for redetermination by Edith Greenan was a jurisdictional requisite in the Tax Court of the United States.

3. That the United States Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that verification was not waived by the filing of the Answer in the Tax Court of the United States on the merits.

4. That the United States Circuit Court of Appeals for the Ninth Circuit erred in determining and in deciding that Edith Greenan had not made herself a party to the proceedings in the Tax Court of the United States for redeter-

mination of the deficiency, and in deciding that the petition in said Tax Court did not even purport to be the petition of Edith Greenan within the meaning of the Tax Court regulations.

5. That the United States Circuit Court of Appeals for the Ninth Circuit erred in failing to hold and determine that verification by Edith Greenan of a petition for redetermination filed in the Tax Court of the United States is a formal or modal matter and not one of jurisdiction.

6. The petition for redetermination filed by James O. Greenan and Edith Greenan in the Tax Court of the United States was a joint petition involving a joint deficiency and assessment of both petitioners as a taxable unit and as though the return were that of a single individual. The United States Circuit Court of Appeals for the Ninth Circuit erred in failing and neglecting to hold and determine that the verification or signature by one of the petitioners is sufficient under the rules of the Tax Court of the United States, and in holding that in such case the rules of practice of the Tax Court of the United States require as a jurisdictional prerequisite that each petitioner must separately verify the petition.

Argument

1. RULE 6 OF THE TAX COURT OF THE UNITED STATES WHICH REQUIRES VERIFICATION OF A PETITION FOR REDETERMINATION IS A FORMAL OR MODAL MATTER AND NOT ONE OF JURISDICTION.

Rule 6 of the Rules of Practice before the Tax Court of the United States, 26 U. S. C. A. Int. Rev. Code following section 5011, requires that the petition shall contain:

"* * *

"(g) The signature of the petitioner or that of his counsel.

> "(h) A verification by the petitioner; provided that where the petitioner is sojourning outside of the United States or is a non-resident alien, the petition may be verified by a duly appointed attorney in fact, who shall attach to the petition a copy of the power of attorney under which he acts and shall state in his verification that he acts pursuant to such power, that such power has not been revoked; that petitioner is absent from the United States. * * *"

The petition for redetermination filed in the Tax Court of the United States did not contain the verification of Edith Greenan, one of the petitioners therein (R. 24). The Petition recited:

> "5. That petitioner Edith Greenan has no knowledge of or concerning the matters and things herein alleged or of or concerning the alleged deficiency income tax the subject hereof.
>
> "6. That hereinafter the word 'petitioner' will be deemed to refer only to the petitioner James O. Greenan unless the contrary affirmatively appear." (R. 8)

The Petition was verified by James O. Greenan, one of the petitioners, on his own behalf and on behalf of Edith Greenan, co-petitioner, and the verification contained the statement "that Edith Greenan has no knowledge of or concerning the matters and things involved herein". This verification was subscribed and sworn to by James O. Greenan (R. 24).

In *Burnet* v. *First National Bank of Fresno*, 46 Fed. (2) 631 (C. C. A. 9)

the Commissioner interposed a motion to dismiss a petition for review for the reason that the petition for appeal from the determination of the Commissioner to the Board of Tax

Appeals was not properly verified. The court held that the motion was without merit. The court said:

"The motion is without merit.

"In discussing a defective cerification to a petition, in *Leidigh Carriage Co.* v. *Stengel* (C. C. A.), 95 Fed. 637, 641, Judge Taft said:

" 'The second objection embodied in the second and sixth assignments of error is that the petition and application were not properly verified. The petition and application were, as we have seen, signed in the names of the petitioners by the attorneys, and there was a verification showing that these attorneys were attorneys of record, and that the facts were true. We do not propose now to pass upon the question whether this petition was verified in proper form. The petition was answered by all the parties in interest, without any objection to its form. We have not the slightest doubt that, under any system of pleading, such a pleading to the merits waives all formal or modal matter, and does not reach to the jurisdiction.' "

In *Continental Petroleum Co.* v. *United States*, 87 Fed. (2d) 91 (CCA 10)

the taxpayer by letter requested an extension of time for the filing of a petition before the Board of Tax Appeals. The Board filed the letter as a petition for redetermination and when the petition was received it was stamped "Amended Petition Appeal Filed 2-8-27". The Board treated it as an amended petition. An answer was filed by the Commissioner and served. The decision of the Board of Tax Appeals was against the taxpayer, pursuant to a written stipulation and agreement. The taxpayer paid the deficiency but subsequently brought an action to recover upon an alleged overpayment of income taxes, to

which suit a plea of *res adjudicata* was interposed. The court said:

> "It has been held that a failure to verify a petition for redetermination in accordance with the rule does not withhold jurisdiction of the Board. Burnet v. First Nat. Bank of Fresno (C. C. A.), 46 F. (2d) 631. Meticulous compliance with every requirement of the rule concerning the contents of a petition is not essential to the exercise of the Board's jurisdiction. A reasonable discretion in determining what constitutes substantial compliance with it, must be reposed in the Board."

Subsequent to the decision in *Burnet* v. *First National Bank, supra,* the Tax Court treated the decision in that case as the law governing it in

National Bank of Commerce, et al., Trustees v. *Commissioner of Internal Revenue,* 34 B. T. A. 119, at page 125,

where the Board said:

> "Whether both trustees should have either signed or verified the amended petitions need not be considered since it has been held that the verification of a petition is not a matter of jurisdiction. Gibson Amusement Co., 22 B. T. A. 1214; Burnet v. First National Bank of Fresno, 46 Fed. (2d) 631."

To the same effect, see

Gibson Amusement Co. v. *Commissioner of Internal Revenue,* 22 B. T. A. 1212 at 1213;

Monitor Amusement Co. v. *Commissioner of Internal Revenue,* 22 B. T. A. 1214 at 1216.

See also *Ethel Weisser,* v. *Commissioner,* 32 B. T. A. 755;

Nellie L. Rhodes, v. *Commissioner,* 44 B. T. A. 1315.

In *Baldwin* v. *Commissioner,* 94 Fed. (2d) 355, 356 (CCA 9)

it appeared that in the estate of Janet M. Baldwin there were two executors. The petition was filed by one only. The petition did not comply with that portion of Rule 5, which required "a majority of the fiduciaries shall either sign or verify the petition". This Court said:

> "The Board of Tax Appeals is specifically authorized to prescribe rules for the conduct of proceedings before it. Section 907 (a) of the Revenue Act of 1924, as amended by section 601 of the Revenue Act of 1928, 26 U. S. C. A. § 611. Such rules have the force and effect of law. Bankers' Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 53 S. Ct. 150, 77 L. Ed. 325; Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 70 L. Ed. 494. The rules prescribed are merely procedural and cannot under any circumstances limit or control the statutory jurisdiction conferred upon the Board. Board of Tax Appeals v. United States ex rel. Shults Bread Co., 1930, 59 App. D. C. 161, 37 F. 2d 442, certiorari denied, 281 U. S. 731, 50 S. Ct. 246, 74 L. Ed. 1147; Weaver v. Blair, 1927, 3 Cir., 19 F. 2d 16."

See also to the same effect:

Board of Tax Appeals v. *United States,* 37 Fed. (2d) 442.

We think the rule that verification is not jurisdictional but merely formal is well stated in

Commercial Bank & T. Co. v. *Jordan,* 278 Pac. 832, 65 A. L. R. 968-972

where the Supreme Court of Montana said:

> "Verification of pleadings is not necessary to vest jurisdiction in the courts. Here, at most, the verifica-

> tion was defective and upon proper and timely objection the defendant in that action could have taken advantage of the defect, but, not having done so, the objection was waived. As was said by this court in Johnson v. Puritan Min. Co., 19 Mont. 30, 47 Pac. 337: 'It is also held that the verification is not a part of the pleadings, strictly speaking, and is not necessary to vest jurisdiction. "Like any other formal matter, its absence is waived by failure to object. And if its entire absence does not affect the jurisdiction, of course mere defects cannot." Van Fleet, Collateral Attack, § 251.'"

2. THE COMMISSIONER ANSWERED TO THE MERITS OF THE PETITION AND THEREBY WAIVED ALL FORMAL AND MODAL MATTERS AND TECHNICAL DEFECTS IN THE PETITION.

In the Tax Court of the United States the Commissioner filed an Answer. The caption of the Answer was identical with the caption of the Petition. The Answer was an answer to the Petition of both petitioners. It was not limited to the Petition of James O. Greenan, and it contained no reservation of any objection to the form of the Petition (R. 42-46). The opening sentence of the Answer is as follows:

> "Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the *above-named petitioners*, admits and denies as follows:" (R. 42.) (Italics ours.)

The Answer admits certain of the allegations of the Petition, denies others specifically, denies others for lack of information, and generally and specifically denies each allegation in the Petition not otherwise admitted, qualified or denied by the Answer. This pleading was a pleading to the merits. The prayer of the Answer is as follows:

> "Wherefore, it is prayed that the Commissioner's determination be approved and the *petitioners'* appeal denied." (R. 45, 46.) (Italics ours.)

It is clear from the Answer that the Commissioner was answering the Petition of both petitioners and not one of them. Upon the filing of that Answer, the cause in the Tax Court was at issue on the merits under Rule 16 of that court, which provides:

> "A proceeding shall be deemed at issue upon the filing of the answer unless a reply is required under Rule 15, in which event the proceedings shall be deemed at issue upon the filing of the reply."

In light of these matters and of the rules, we urge that the Commissioner had answered pleading to the merits, and that the objections urged by the Commissioner were thereby waived.

In

41 American Jurisprudence Sec. 391

it is said:

> "The rule as to waiver of defects or omissions in pleadings has been applied to various matters not going to the jurisdiction of the subject matter or to the sufficiency of the pleading to state a cause of action. A litigant, it has been held, may waive an objection because of the form of the action; failure to allege performance of statutory action; duplicity; uncertainty and indefiniteness of allegations; inconsistency or repugnancy of allegations; *want of or defects in verification or in the conclusion or prayer;* defective pleading of waiver, knowledge, or other matters not of a vital character." (Italics ours.)

In

41 American Jurisprudence Sec. 210

the following applicable rule is laid down:

> "It is a well-settled common-law rule which is generally applied under the codes and modern practice statutes that a party cannot both demur and answer to the

same parts of a declaration or complaint at one and the same time, and if he does so he will be considered as having waived his demurrer."

See also

Oregon R. R. & Navigation Co. v. *Dumas*, 181 Fed. 781 (C. C. A. 9).

In

United Kansas Portland Cement Co. v. *Harvey*, 216 Fed. 316-318

the court said:

"If the petition states a good cause of action but is technically defective, it should be raised by demurrer, and the plaintiff thus given an opportunity to amend. When an answer to the merits is filed, it is an admission on the part of the defendant that the petition is not technically objectionable, and no defect of that nature can be taken advantage of thereafter. * * * It is true, under the common-law practice, when pleadings were considered of greater importance than the substantial rights of the parties, this practice was very common, but at this day it is universally recognized that courts are intended to promote the ends of justice and will disregard all technicalities which tend to defeat them."

In

In re Chequasset Lumber Co., 112 Fed. 56 at 58

the court said:

"This authority holds, however, that a defective verification is not jurisdictional, and could not, in any event, do more than check the progress of litigation until the verification should be properly made. But I do not think the motion should prevail even to that extent. It fully appears that the persons who made the verifications were the ones most fully acquainted with the facts, and apparently the only agents of the cor-

poration who had the necessary knowledge to enable them to verify the petition. The verifications are deemed sufficient. Carriage Co. v. Stengel, 37 C. C. A. 210, 95 Fed. 637, 641; Bank v. Craig, 6 Am. Bankr. R. 381, 382, 110 Fed. 137."

This case is also authority and justification for the verification of the Petition by the petitioner James O. Greenan alone because he was the one most fully acquainted with the facts, it appearing from the Petition (R. 8) and the verification (R. 24) that the petitioner Edith Greenan had no knowledge of or concerning the matters and things alleged in the petition or of or concerning the deficiency income tax the subject thereof or the matters involved in the proceeding.

In

Glaspie v. *Keator*, 56 Fed. 203 at 211, 213

the court said:

> "The demurrer seems to have been based on the ground that the complaint was defective in not showing with sufficient certainty that any damage was sustained in consequence of the alleged deceit. The point is untenable. The complaint averred generally, in the concluding paragraph, that damages had been sustained in a certain sum, which was all that the pleader was required to aver. But even if the complaint had been defective, as supposed, it was merely a technical defect, which was waived by pleading to the merits, and was cured by the verdict."

3. NEITHER THE COMMISSIONER NOR HIS COUNSEL WERE MISLED OR PREJUDICED BY THE ABSENCE OF VERIFICATION BY EDITH GREENAN, BY THE WORDING OF THE PRAYER, THE DESCRIPTION OF COUNSEL, NOR THE ABSENCE OF SIGNATURE OF EDITH GREENAN.

The Petition filed in the Tax Court of the United States was captioned in the names of "James O. Greenan and

Edith Greenan, Petitioners" (R. 2). The opening sentence of the Petition is as follows:

> "The above named petitioners, James O. Greenan and Edith Greenan, hereby petition for a redetermination of the deficiency * * *." (R. 2.)

Paragraph I of the Petition also refers to the "Petitioners" and gives their respective residences. In the same paragraph it is also stated that "No return was filed by the petitioners for the year 1936" (R. 3). Paragraph II of the Petition refers to the mailing of the notice of deficiency to the petitioners (R. 3), and in paragraph III it is the petitioners who make the assignments of error committed by the Commissioner in the determination of the deficiency (R. 4). Again in paragraph V the following appears: "The facts upon which petitioners rely as sustaining their assignments of error are as follows:" (R. 7).

The Answer, as we have previously pointed out, was an answer "to the petition filed by the above-named petitioners" (R. 42), and the prayer was that the "Commissioner's determination be approved and the petitioners' appeal denied" (R. 45, 46). The Answer was to the merits of the Petition of the petitioners, and prayed that the petitioners' appeal be denied. The Answer was served upon Geo. B. Thatcher, whose name appears as counsel (R. 48). Respondent treated and accepted Geo. B. Thatcher as counsel for Edith Greenan as well as James O. Greenan, in giving the notice of the filing and the hearing of the motion to dismiss and in the service of the Answer (R. 48).

Neither the respondent nor his counsel were in any wise misled by the wording of the prayer, the description of counsel, any absence of signature, or the form or lack of verification, nor were they in any wise prejudiced thereby.

The Commissioner and his counsel were in position to and did answer the Petition of the petitioners fully and completely. They could have done or said no more in the Answer (R. 42-46).

In

Barlco Oil Co. v. *Alexander*, 33 Fed. Supp. 32

the court held:

> "Failure to type or print signatures of attorneys under their names or to insert their addresses in connection with their signature to complaint might warrant striking out the pleading, but would not justify dismissal of the case."

The opening prayer of the Petition (R. 2) should of course be taken in connection with the closing prayer of the Petition, and in construing the Petition all intendments should be resolved in favor of the pleader and to uphold the Petition. The rule is well settled that a prayer is no part of the pleading. It is important where a judgment by default is taken because it there limits the relief which can be accorded. Where there is an answer, however, a different rule prevails. This, we think, is succinctly stated by the Supreme Court of Nevada in the case of

Sugarman Co. v. *Morse Bros.*, 50 Nev. 191, 255 Pac. 1010.

The court there said:

> "It is argued that there is no prayer for an injunction in the complaint; hence no error was committed in denying injunctive relief. There is a prayer for general equitable relief. Such a prayer warrants any relief the party is entitled to. *In fact, when there is an answer, the prayer is immaterial*, as has often been held, even by this court." (Italics ours.)

4. THE DEFICIENCY ASSESSMENT WAS A JOINT ASSESSMENT AGAINST BOTH JAMES O. GREENAN AND EDITH GREENAN JOINTLY, AND A VERIFICATION BY JAMES O. GREENAN, ONE OF THE PETITIONERS, FOR HIMSELF AND ON BEHALF OF EDITH GREENAN WAS SUFFICIENT UNDER RULE 6 OF THE TAX COURT OF THE UNITED STATES.

No return was filed by either of the petitioners for the years 1935 and 1936 for the reasons hereinbefore pointed out (R. 2, 4).

The deficiency letter is a joint notice and letter sent to each of the petitioners and the Commissioner therein claims a joint deficiency for all of the years mentioned—1935, 1936, and 1938 (R. 27). No attempt was made in the deficiency or notice or in the computations and exhibits attached thereto (R. 25-38) to apportion the tax liability between the taxpayers in accordance with their respective incomes. There was but one determination in solido, and the Commissioner asserted and intended to assert thereby a joint liability against the parties.

In

Taft v. *Helvering,* 311 U. S. 195, 198, 85 Law Ed. 122, 124

this Court, in discussing the Revenue Act of 1921 and the regulations thereunder which permit of the filing of a single joint return by husband and wife, said:

> "The argument stresses the words 'to which either is entitled' and it is urged that each spouse is entitled only to deduct 15 per cent of his or her separate net income. But we think that this is an inadmissible construction of the statute and is not a necessary construction of the regulation. Such a construction is inconsistent with the premise of the Solicitor's opinion, above mentioned, that a joint return 'is treated as the return of a taxable unit' and the tax is to be laid as though the return were that 'of a single individual.'

> The more specific language of the provision in the Act of 1921, which for the present purpose is the same as that in the Act of 1934, affords a stronger basis for this conclusion. It provides specifically for the inclusion of the income of each spouse 'in a single joint return' and in that case that 'the tax shall be computed on the aggregate income.' The principle that the joint return is to be treated as the return of a 'taxable unit' and as though it were made by a 'single individual' would be violated if in making a joint return each spouse were compelled to calculate his or her charitable contributions as if he or she were making a separate return."

If a husband and wife making a joint return are to be treated as a "taxable unit" and as though the return were made by a single individual, then we think upon principle that it is clear that both parties must join or be joined in any proceeding before the Tax Court where the return or the tax liability is drawn into controversy. On principle also, we urge that a joint petition for redetermination in the Tax Court is sufficient if signed and verified by one of the parties to such joint return and joint determination of deficiency.

In case of a joint liability, we urge moreover that a joint obligor is entitled to insist that his co-obligor join him in any assertion of right or defense of liability. See

Schram v. *Perkins*, 38 Fed. Supp. 404, 407;
Richter v. *Poppenhausen*, 42 N. Y. 373, 376.

The overwhelming weight of authority is that in joint actions either party may verify the pleading.

In

Jones v. *Austin* (Texas), 26 S. W. 114

it was held that a joint plea verified by one defendant is available for both. See also

Butterfield v. *Graves, et al.*, (California) 71 Pac. 510, 511.

See also

7 A. L. R., Note 2, page 36.

49 Corpus Juris, page 594, states the rule as to co-parties as follows:

> "Where several persons join in a pleading, it is held as a rule, in the absence of any statutory provision to the contrary, that a verification thereof by one of them is sufficient."

See also

41 American Jurisprudence, Sec. 283, page 485.

Conclusion

The purpose in creating the Board of Tax Appeals and its successor, the present Tax Court of the United States, was to provide a more convenient, more equitable, and more speedy remedy to a person against whom a tax is improperly assessed, and these provisions are to be liberally construed.

Houston Street Corp. v. *Commissioner of Internal Revenue*, 84 Fed. (2d) 822.

If the provisions of the Act itself are to be liberally construed, certainly rules of practice and procedure should receive the same construction and application, and causes should not be dismissed for technical objections as to form which go to form only and not to substance.

In

Helvering v. *F. & R. Lazarus & Co.*, 308 U. S. 252, 84 Law Ed. 227

this Court said:

> "In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specificially emphasized the equita-

ble nature of proceedings before the Board of Tax Appeals by requiring the Board to act 'in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.' "

The purpose of pleading is stated by this Court in *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 82 Law Ed. 745,

where the Court said:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end * * * proper pleading is important but its importance consists of its effectiveness as a means to accomplish the ends of a just judgment."

Your petitioners therefore pray that this Court grant the writ of certiorari petitioned for herein.

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